

Responding to Threats to the Rule of Law in Hong Kong

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KEY TAKEAWAYS

The U.S. government must consider targeted solutions to obvious challenges posed by Beijing's interference and continuing abuses in Hong Kong.

In the face of severe, long-term consequences of the loss of an ally in freedom, such as Hong Kong, there is a clear need for a strong, U.S.-led response.

The U.S. should take firm action, sanctioning Chinese officials responsible for undermining Hong Kong's autonomy, and upholding statutory obligations to Hong Kong.

Since protests first erupted more than six months ago,¹ Hong Kong has been seized with seemingly unquenchable political fervor. Originally animated by a desire to block proposed legislation that would have enabled anyone to be extradited from Hong Kong to China at Beijing's request, protests have since taken on a life of their own.

From the start, protests were primarily motivated by a desire to preserve the rule of law and the fundamental freedoms that Hong Kongers hold so dear. While the original motivation for the protests, the extradition bill, was eventually withdrawn by Hong Kong's embattled chief executive, Carrie Lam, it was deemed too little, too late by protestors who now seek redress of grievances accumulated during the protests, as well as full political enfranchisement.²

The intransigence of Hong Kong's leadership, and the failure to respond with agility to the demands

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of its citizens, caused protestors to entrench and coalesce around several common demands: (1) universal suffrage (full voting rights); (2) a complete investigation of police brutality carried out by Hong Kong security forces; (3) dropping the charge of “rioting” against arrested protestors; (4) reform of the public order ordinance that serves as a basis for arrests of the protestors; and (5) the full withdrawal of the extradition bill. Only the last of these demands has been met so far, and the protests do not show any sign of stopping. (Some have also called for the resignation of the chief executive.)

Observing Hong Kong requires taking into account a number of exogenous factors—most notably, Beijing and the Chinese Communist Party’s (CCP’s) response to the current climate in Hong Kong. The CCP sees unrest in Hong Kong as a threat to its sovereignty. While early predictions that Beijing might intervene militarily in Hong Kong have not come true, if it comes to see the unrest as a threat to stability in the mainland, or CCP control, this may change.³ Meanwhile, Beijing has undertaken attempts to undermine Hong Kong’s political system in a more fundamental way—by threatening the independence of its own institutions.

If the U.S. is to continue to be a beacon for liberty in Asia, it must have several lines of policy defenses with which to respond—not only in support for the peaceful elements of the protests, but in opposition to Beijing’s efforts to undermine the very institutions that preserve liberty in Hong Kong. That requires the U.S. government to consider targeted solutions to discrete challenges posed by Beijing’s interference in Hong Kong as well as the health and status of Hong Kong as an autonomous “administrative” region. U.S. policy should be guided by these two principles.

The Current Context

After protests waged on, Hong Kong held district council elections on November 24, 2019. Usually a quiet affair, the local elections to strictly advisory offices with no formal power drew close to 3 million voters to the polls, and delivered an unmitigated win for pro-democracy candidates who won nearly 90 percent of the seats.⁴

While Hong Kongers cast their votes, Beijing was busy undermining another branch of Hong Kong’s government: the judiciary.⁵ Ahead of the local elections, Hong Kong’s High Court issued a determination that declared a controversial mask ban unconstitutional.⁶ This resulted in an immediate restoration of Hong Kong protestors’ ability to don masks while protesting. Within a day, Beijing responded with a chilling rebuke declaring that Beijing’s legislature, not Hong Kong’s judiciary, possessed the

sole authority to determine the constitutionality of the mask ban. Beijing further asserted that Beijing's constitution and Hong Kong's constitution, the Basic Law, *together* governed the Special Administrative Region and that these two laws in tandem would form the basis of determining the constitutionality of the mask ban.⁷ This is a fundamental violation of the Hong Kong judiciary's autonomy that has not been seen before. Subsequently, a mask ban was temporarily reinstated for a period of seven days during the time of local elections.⁸ While the mask ban is currently suspended, and protestors can now wear masks again, the issue remains an ongoing legal battle as the case heads for appeal.⁹

In undertaking this decision, Beijing confirmed protestors' worst fears—that the rule of law was being undermined through Chinese intervention. The original reason that protestors took to the streets in June 2019 was fear of the implications of the extradition bill.

As long-time Hong Kong democracy activist and lawyer Martin Lee so aptly put it: "There is no extradition law because there is no rule of law in China, where the Chinese Communist Party dictates who is innocent and who is guilty."¹⁰

When the British returned Hong Kong back to China in 1997, they inaugurated the Basic Law, which established the "one country, two systems" framework that undergirds the rule of law in the Hong Kong Special Administrative Region today.¹¹ When the handover took place, it was agreed that this framework would remain in place until 2047. But Beijing's decision to call into question the High Court's decision poured fuel on the fire of an already energized public that is frustrated by the failure of Hong Kong authorities to respond to their demands amid mounting fears that they will gradually surrender their freedoms to Beijing sooner than 2047, and after 2047, have no hope of maintaining any independence.

This erosion of institutions and freedom in Hong Kong merits a strong response from the U.S. government.

Responding to the Crisis in Hong Kong

In November 2019, Congress initiated the most significant response since protests began by passing the Hong Kong Human Rights and Democracy Act, which President Donald Trump then signed into law.¹² Prior to the President ultimately signing the bill, the Vice President, the Secretary of State, the U.S. Department of State, and the President himself made several formal, well-developed statements on the issue.¹³ But these statements were merely rhetorical. In addition, the President made several comments off

the cuff or through Twitter that, while consistent on the necessity of Chinese restraint, confused the U.S. government's messaging. In fact, only days before he signed the bill, the President seemed to hint at a veto.¹⁴

In the face of such severe, long-term consequences as the loss of an ally in freedom, such as a Hong Kong truly governed as the separate system promised by Beijing, there is a clear need for a stronger, U.S.-led response. The new law does much to fill the void in U.S. policy that existed prior to its passage. But it is by no means enough.

It is in the U.S. interest to act—not only because it has historically played a role as a defender of liberty and freedom in Asia, but because there are economic and security consequences for inaction.¹⁵

Since The Heritage Foundation's inaugural issue of the *Index of Economic Freedom*, Hong Kong has ranked in first place¹⁶ and is well-known as a bastion of commerce, trade, and innovation where at least 85,000 American businessmen and businesswomen operate daily.¹⁷ Without a strong U.S. response, Hong Kong's status as a pre-eminent model of economic freedom in Asia and the world may be hanging in the balance.

Beyond interests, the U.S. is obligated under the Hong Kong Policy Act of 1992 to support Hong Kong's continued autonomous status, specifically:

The United States should play an active role, before, on, and after July 1, 1997, in maintaining Hong Kong's confidence and prosperity, Hong Kong's role as an international financial center, and the mutually beneficial ties between the people of the United States and the people of Hong Kong.¹⁸

In light of these facts, the U.S. government should:

- **Uphold U.S. obligations under the Hong Kong Policy Act of 1992 by outlining clear consequences to officials in Beijing found undermining Hong Kong's autonomy.** The U.S. made commitments to safeguard the prosperity and autonomy of Hong Kong and its people. A failure to do so would represent a failure to uphold the intentions of the 1992 act. That should mean holding Beijing accountable, particularly when it intervenes in Hong Kong's institutions.
- **Sanction those Chinese officials who are responsible for undermining Hong Kong's autonomy.** Whether the Hong Kong Human Rights and Democracy Act was signed into law or not, the President, U.S. Department of State, and U.S. Treasury already possessed tools to hold officials in Hong Kong and Beijing accountable. These include

Global Magnitsky authorities, which enable individuals and entities to be placed on the Specially Designated Nationals List for violating human rights or engaging in corruption. In addition to financial sanctions, the U.S. should also consider instituting travel restrictions on any official (or his or her immediate family members) directly involved in gross human rights violations. This authority is granted under § 7031(c) of the fiscal year 2019 Department of State, Foreign Operations, and Related Programs Appropriations Act.¹⁹ It should be used selectively and intentionally.

The President should:

- **Comply with all reporting requirements in the Hong Kong Human Rights and Democracy Act in a timely and thorough manner.** Under the terms of the act, the President is required to identify any individuals responsible for human rights abuses in Hong Kong 180 days from enactment of the bill, and then at least once a year after that for five years. This leaves it up to the executive branch to determine, subject to the advice of the congressional committees of jurisdiction, who should be targeted for sanctions. There is another critical reporting requirement in Section 5 of the act that requires the Secretary of State and Treasury Secretary to report on any violations of U.S. export laws by Hong Kong or Beijing that concern concrete U.S. interests in upholding “one country, two systems.”

The Secretary of State should:

- **Certify to Congress whether Hong Kong continues to merit a legal status separate from China.** The Hong Kong Human Rights and Democracy Act requires the Secretary of State to certify that Hong Kong maintains its autonomy.²⁰ The special status under U.S. law, outlined in the Hong Kong Policy Act of 1992, comes with particular legal, trade and economic, and travel privileges that are predicated on Hong Kong’s ability to maintain the rule of law. If Hong Kong is found to be insufficiently autonomous, U.S. government officials should give careful consideration to what a negative certification might entail, and be sure that in revoking Hong Kong’s special status, they are not inadvertently playing into the hands of a Beijing that may view the U.S. revocation of Hong Kong’s special status as cart blanche to bring a premature end to the “one country, two systems” arrangement that

legally lasts until 2047. The recently passed law includes a national security waiver that gives the President the option to re-certify, or not, Hong Kong's status. Providing a national security justification for the President to not report on Hong Kong's status to Congress, a mere inter-branch communication, is a high bar to meet. While it is the President's prerogative to utilize it, it is difficult to envision a scenario that would justify utilizing a waiver for a mere certification requirement. If the Chinese government were to express displeasure over such a certification, for example, this would be an insufficient reason for the President to invoke the national security waiver.

There should be no ambiguity in U.S. policy or rhetoric when it comes to Hong Kong. The U.S. supports a free and economically vibrant Hong Kong and there are policy implications if it no longer continues to be so. Until it is absolutely necessary, the U.S. should maintain Hong Kong's status as separate from China and impose particularized and individualized policy consequences on those in Beijing that seek to undermine freedom, liberty, and autonomy in Hong Kong.

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